Irish Merger Control
A guide to Merger Control under the Competition Act 2002
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Ireland has a compulsory notification system for certain types of mergers, acquisitions and joint ventures. The Competition Act 2002 (Act) sets out the rules for this regime.

The Act confers responsibility for vetting transactions on the Competition Authority with the exception of media mergers where both the Authority and the Minister for Enterprise, Trade & Employment (Minister) are involved.

The test for approving transactions is whether they will “substantially lessen competition in markets for goods or services” in Ireland. Additional media-related criteria may be applied by the Minister in media mergers.

This guide is an introduction to the Irish merger control regime and is updated and supplemented on A&L Goodbody’s specialist competition website: www.algoodbody.ie/eu.

While the Irish regime has some features which are comparable to those of the EU and the US, the manner in which the regime has been applied and operated means that specialist Irish legal advice should be sought.

A&L Goodbody’s EU & Competition Law Unit is at the forefront of competition law practice in Ireland. The Unit is pre-eminent in its field and has advised the private and public sectors both nationally and internationally. Please feel free to contact any member of the Unit at any time for advice or assistance.

Summary Flowchart: Notification in Ireland

- Is there a merger, acquisition or full-function joint venture within the meaning of the Act?
  - Yes
    - Is the worldwide turnover of each of 2 or more of the undertakings involved (other than the vendor) at least €40 million?
      - No
        - No notification required
      - Yes
        - Consider voluntary notification if transaction raises material competition issues in Ireland
  - No
    - Do at least 2 undertakings involved in the transaction carry on business in any part of the island of Ireland?
      - No
        - No compulsory notification required (unless it is a media merger which must be notified)
      - Yes
        - Is the turnover in the Republic of Ireland of one of the undertakings involved at least €40 million?
          - No
            - Compulsory notification
          - Yes
            - Consider voluntary notification if transaction raises material competition issues in Ireland
Introduction

The Act applies to the following transactions – which can be generally described as ‘mergers’ or ‘concentrations’:

- **Mergers**
  A merger arises where two or more undertakings, previously independent of one another, merge.

- **Acquisitions**
  An acquisition arises where a purchaser acquires direct or indirect control of the whole or part of another undertaking.

- **Asset Acquisitions**
  An asset acquisition arises where a purchaser acquires all or a substantial part of the assets (including goodwill) of another undertaking, thereby replacing or substantially replacing that undertaking in the relevant business.

- **Full-Function Joint Ventures**
  A full-function joint venture arises where the joint venture is created to perform, on an indefinite basis, all the functions of an autonomous economic entity.

What is control for the purposes of the Act?

In order to assess whether or not a transaction is subject to the notification regime in the Act, it is necessary to establish whether control is being acquired. Under the Act, control is regarded as existing if “decisive influence is capable of being exercised” over the undertaking being acquired (or, in relation to a full-function joint venture, being created). Under the Act, decisive influence is regarded as existing, in particular, by the acquisition of ownership of, or the right to use all or part of, the assets of an undertaking, or rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking. Control exists through securities, contracts or any other means. No further guidance is given by the Authority in relation to the meaning of “decisive influence”.

While the Authority directs notifying parties to take guidance from certain of the European Commission’s merger control notices, the Notice on Concentrations is not included. Therefore, while the Notice on Concentrations may be of assistance (as well as decisions of the Commission under the European Merger Control Regulation (MCR)), care should be exercised in relying on the vay in which decisive influence is interpreted under the MCR when analysing mergers under the Act.

Do the notification requirements cover joint ventures?

Yes, the creation of a full-function joint venture is notifiable under the Act. A full-function joint venture is one which is created to perform, on an indefinite basis, all the functions of an autonomous economic entity. The Authority has issued no guidance on the interpretation of this definition but some guidance can be sought from the European Commission’s Notice on the Concept of Full-Function Joint Ventures.

Is there any exemption to the notification requirement?

Yes. Intra-group transfers, mergers where a financial undertaking acquires control over another undertaking on a temporary basis (and where any exercise of voting rights is for disposal purposes only within a one year period), acquisitions by receivers, liquidators, underwriters and jobbers and acquisitions arising from testamentary dispositions, intestacy or the right of survivorship under a joint tenancy are all excluded from the notification requirement.

### Types of Notifiable Transactions

#### 1. Types of Notifiable Transactions

**Summary Flowchart: Review Process**

- **Phase I**
  - Notify the Authority within 1 month of the conclusion of an agreement or the making of a public bid

  - Authority must clear the transaction or initiate a full investigation (i.e. open Phase II) within 1 month of notification (or of the receipt of further information in response to formal questions after notification)

  - Have parties offered commitments to the Authority?

    - Yes
      - The Authority must either allow the transaction to proceed (with or without conditions) or initiate a Phase II investigation by Authority

    - No
      - Clearance (subject to a further 10-day waiting period if it is a media merger and Minister takes no action)

- **Phase II**
  - Where the Authority conducts a Phase II investigation, it has 4 months from date of notification (or of the receipt of further information after notification in response to formal questions) in which to consider the transaction

  - The Authority allows the transaction to proceed (with or without conditions). If the transaction is a media one then the Minister may direct a Phase II investigation by Authority

  - Authority prohibits the transaction

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2. Financial Thresholds for Notification

Which transactions must be notified?
A transaction must be notified to the Authority under the Act if:
- the worldwide turnover of at least two of the undertakings involved is not less than €40 million; and
- at least two of the undertakings involved carry on business in any part of the island of Ireland (i.e. the Republic of Ireland and Northern Ireland); and
- the turnover in the State (i.e. the Republic of Ireland) of at least one of the undertakings involved in the transaction is not less than €40 million.

The thresholds relate to the most recent financial year of the undertakings concerned. The term “turnover in the State” is understood by the Authority to comprise sales made or services supplied to customers within the State.

What is the meaning of the term “undertakings involved”?
The Authority has clarified that, for the purposes of calculating turnover and assessing whether business is carried on in any part of the island of Ireland, the term “undertakings involved” means the entire group of undertakings to which an undertaking belongs. The term “undertakings involved” excludes however the vendor of the business being sold.

What does the term “carry on business in any part of the island of Ireland” mean?
The Authority has stated that the term “carry on business in any part of the island of Ireland” includes sales of goods or supply of services into the island of Ireland without having a physical presence within the island. This interpretation is potentially very wide and has caught many foreign-to-foreign transactions.

Are transactions that fall below the merger notification thresholds subject to the Act?
The Act allows the Minister to specify a class of transaction which must be notified irrespective of the thresholds. The Minister has adopted only one Order so far and this designates media mergers as a type of merger which is notifiable regardless of the thresholds for compulsory notification. This means that all media mergers must be notified to the Authority irrespective of the turnover of the parties worldwide or in Ireland. The special procedural rules applicable to media mergers are set out below.

3. Notification Requirements

Is there a mandatory notification regime in Ireland?
Yes. Where the turnover thresholds are met or it is a media merger, the parties must notify the proposed transaction to the Authority.

When is a transaction notifiable?
A transaction must be notified to the Authority within one month of the conclusion of an agreement or the making of a public bid.

What is the penalty for failure to notify on time?
Non-notification or late notification of a notifiable transaction is a criminal offence and certain individuals who do not notify a notifiable transaction can be liable to fines of up to €250,000 and daily default fines of up to €25,000.

Who must notify a transaction?
Each of the “undertakings involved” in the transaction must notify the Authority. The Act provides that the undertakings involved in a merger are the purchaser(s) and the target(s) but not the vendor. This means that a vendor does not have to notify a transaction but may choose to do so.

Is there a specific form which must be used for the notification?
Yes. The notification to the Authority must be made in writing using either notification forms M1 or M2 (the latter being for so-called short-form notifications). A Form M1 is used where there is material overlap between the parties (i.e. 15% or more in relation to horizontal overlap and 20% or more in relation to vertical overlap). A short-form M2 is used where there is either no material overlap or no material effect on competition (i.e. there is less than 15% horizontal overlap and less than 20% vertical overlap between the parties). Both Forms M1 and M2 require extensive information on the notifying parties, their businesses, the extent of any overlap and competition in the market. While there is no specific question in either Form relating to a definition of the relevant product and geographic markets, such an analysis is normally included in both Forms M1 and M2.

Is there a notification fee payable to the Authority?
Yes. The current fee for all notifications under the Act is €8,000.

Can parties make a voluntary notification to the Authority?
Yes. The undertakings involved in a transaction may request, in certain circumstances, a pre-notification meeting with the Authority to discuss any issue and the Authority will consider such a request provided there is sufficient evidence of an intention by the parties involved to conclude the transaction.

If a transaction does not meet the thresholds but leads to high market concentration in Ireland (e.g. a combined market share of more than 40%), the Authority has stated that the transaction is likely to raise competition issues and therefore a voluntary filing should be considered. Other serious competition issues with a transaction may also make it prudent to notify the Authority voluntarily. While there is no obligation to make such a notification (and no fine can be imposed for non-notification), parties which enter into such transactions without clearance run the risk of an investigation by the Authority under the general competition provisions of the Act (i.e. the prohibitions on anti-competitive arrangements and abuse of dominance) and having their transaction declared void.

The Authority has issued a notice on non-notifiable mergers which indicates that it may seek an injunction to restrain implementation of a non-notifiable transaction which raises serious competition concerns. The notice also indicates that, where such a transaction has already been completed, the Authority may apply to the courts to have it reversed.

Is it possible to discuss a transaction with the Authority before a notification is made?
Yes. The undertakings involved in a transaction may request, in certain circumstances, a pre-notification meeting with the Authority to discuss any issue and the Authority will consider such a request provided there is sufficient evidence of an intention by the parties involved to conclude the transaction.
4. Assessment of the Notification

What is the substantive test applied by the Authority?

The Authority will seek to establish whether the transaction would “substantially lessen competition” in markets for goods or services in Ireland. This is the so-called “SLC test”. The Authority has issued guidance on how to apply the test. It has stated that it will interpret the SLC test in terms of consumer welfare. The effect on consumer welfare is measured primarily by whether prices in the market will rise.

What does the Authority’s assessment involve?

The Authority will analyse transactions by taking into account elements such as:

(i) the relevant product and geographic markets;
(ii) for each relevant market identified, the measurement of the effect of the proposed transaction on market structure. This involves calculating the level of concentration between the merging parties and their competitors. This is done by using the Herfindahl-Hirschmann Index of concentration;
(iii) an assessment as to whether the proposed transaction has an effect on the level of rivalry among existing competitors in the market. This will involve an analysis of the likelihood of an exercise of market power by the merged entity (unilateral effects) and whether increased collusive behaviour between competing undertakings would restrict the market (co-ordinated effects);
(iv) an analysis as to whether entry into the market by a new competitor is sufficiently easy to prevent the merged entity exercising any market power;
(v) an analysis as to any likely pro-competitive benefit to the market of such a transaction (i.e. any potential efficiency gains); and
(vi) an analysis as to whether, in all the circumstances, the transaction would substantially lessen competition in Ireland.

May the Authority accept commitments from the parties?

Yes. The Act allows the Authority to enter into discussions with the undertakings involved and other interested parties with a view to identifying measures which would “ameliorate” any harmful effect of a proposed transaction on competition in Ireland. The Authority may accept binding commitments from undertakings to remove potential anti-competitive effects in either Phase I or Phase II.

5. Review Process

An analysis of a transaction by the Authority potentially involves a two phase process.

PHASE I

In Phase I, the Authority has one month from the date of the notification (or from receipt of information further to a formal request for information) to either permit the transaction or to decide to carry out a detailed Phase II investigation.

The notifying parties may, during Phase I, offer commitments (i.e. measures which would ameliorate any effect of the merger on competition) to the Authority to ensure clearance of the transaction in Phase I. If commitments are offered, the Authority would then have a further 15 days in which to reach its decision. In addition, third parties are entitled to make submissions to the Authority in relation to the transaction.

May the Authority request additional information once it has received a notification?

Yes. The Authority may request further information within one month of receipt of a notification. The formal request means that the one month period starts again from the date the information request is fulfilled. Non-compliance with such a request is a criminal offence which can attract fines of up to €250,000. The Authority often asks questions on an informal basis (i.e. without affecting the time period for investigation) before it considers it necessary to make a formal information request.

PHASE II

Where the Authority has decided to open a Phase II investigation, the Authority has, in effect, a further three months to reach its decision (i.e. four months from receipt of the notification or receipt of information from the notifying parties after a formal information request by the Authority).

On completion of a full investigation, the Authority may decide that the transaction:

(i) may be put into effect;
(ii) is prohibited and may therefore not be put into effect; or
(iii) may be put into effect subject to certain conditions specified by the Authority.

May the Authority issue a Statement of Objections?

The Authority has issued procedural guidelines outlining the review process for notified transactions. These guidelines deal in particular with Phase II investigations. Within six weeks of entering into a Phase II, the Authority will normally either clear the transaction or issue an “Assessment” to the notifying parties. The Assessment is similar to a Statement of Objections but the Authority has stated that the document should not be seen as a Statement of Objections. Such an Assessment will set out the Authority’s concerns regarding the effect of the proposed transaction on competition in the relevant markets. Following the issue by the Authority of the Assessment, the notifying parties usually have three weeks within which to reply to the Assessment.

Will the notifying parties be granted access to the file?

Access to the file is granted only in Phase II after the Assessment has been issued. Access to the file involves giving the notifying parties access to comments or complaints received from third parties. However, access to internal working documents of the Authority will not be granted to the notifying parties, as well as confidential matters or commercial secrets and documents more conveniently obtainable from other sources. Practice has varied somewhat regarding the level of access to the file and it has not been as extensive as might be imagined by those outside the Irish regime.

May additional submissions be made to the Authority during Phase II?

Yes. In practice, a Phase II investigation will lead to increased contact between the Authority and the notifying parties. The Authority is likely to ask for meetings with business people to understand the market and how it operates, assuming this has not already occurred during Phase I. The Authority is also likely to require further and more detailed information from the parties. In a Phase II, further information requests do not impact on the time limits set down by the Act for investigation.

May the Authority compel any person to provide evidence?

Yes. The Authority may summon witnesses to attend before it, examine them on oath and require any such witness to produce to the Authority any document in his or her power or control.

The Authority has issued a number of summonses in merger investigations. Failure to comply with such requests can lead to fines of up to €3,000 and/or imprisonment of up to 6 months.

Are ancillary restraints dealt with by the Authority?

Yes. If the notifying parties identify restrictions which they consider to be directly related and necessary to the implementation of the transaction, the Authority may determine that such ancillary restraints do not raise competition issues.
6. Media Mergers

What is a media merger?
The Competition Act identifies a media merger as a transaction in which any of the undertakings involved carries on a media business in Ireland. A media business is defined as:
(i) the publication of newspapers or periodicals consisting substantially of news and comment on current affairs;
(ii) a business providing a broadcasting service; or
(iii) a business providing a broadcasting services platform.

The definition of a media merger is very wide as only one of the undertakings involved (including the purchaser) needs to carry on a media business for the merger to qualify as a media merger.

Why are media mergers different from other mergers?
Ireland has recognised the special role of media in society and the legislature has accordingly provided a specific merger regime for the sector. The importance of media mergers is that first, they have been designated as a specific class of merger which is notifiable irrespective of whether the transaction would be compulsorily notifiable or not; secondly, criteria other than competition criteria may be taken into account in deciding whether to approve the transaction; and thirdly, the Minister is involved in the decision-making process.

What are the specific procedures associated with media mergers?
Apart from the normal procedural requirements, there are some specific procedures involved in media mergers. If the Authority proposes to clear the media merger after Phase I, the Minister has the power to order the Authority (within 10 days of the Authority’s decision) to conduct a Phase II analysis of the transaction.

If, at the end of the Phase II investigation, the Authority still believes the transaction should be cleared (absolutely or conditionally), the Minister then has the final decision. The Minister may, in such circumstances, clear the media merger absolutely, clear the media merger on conditions or prohibit the media merger within 30 days of the Authority’s determination.

If the Authority decides to prohibit a media merger the Minister does not then have the power to assess the media merger.

Ultimately, a media merger decision by the Minister may be annulled by the Irish Parliament.

Which criteria are applied when assessing media mergers?
As with all other transactions, the Authority analyses whether a media merger will lead to a substantial lessening of competition in Ireland. The Authority will also apply public interest criteria when assessing a media merger (i.e. a public interest test concerning the effects of the media merger).

The relevant criteria which the Minister may only have regard to in reaching his or her decision are:
- the strength and competitiveness of media businesses indigenous to Ireland;
- the extent to which ownership or control of media businesses in Ireland is spread among individuals and other undertakings;
- the extent to which ownership or control of particular types of media businesses in Ireland is spread among individuals and other undertakings;
- the extent to which a diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in Ireland; and
- the market share in Ireland of one or more of the types of business activity falling within the definition of “media business” that is held by any of the undertakings involved in the merger and which has an interest in such an undertaking.

7. Appeals

Is it possible to appeal a decision of the Authority?
Yes. The Act provides for a right of appeal to the High Court against a determination of the Authority for any of the parties to a transaction, where that determination prohibits the transaction taking effect or where it attaches conditions. The appeal on a point of law may be made to the Supreme Court.

If a decision of the Minister in relation to a media merger is ultimately annulled by the Irish Parliament then the original determination of the Authority approving (or conditionally approving) the transaction is reinstated. Such a reinstated transaction may then be appealed as set out above.

May all decisions of the Authority be appealed under the Act?
An unconditional clearance in respect of a transaction may not be appealed under the Act.

What are the time-limits for such an appeal?
Any such appeal must be made within one month of the Authority’s determination, unless the transaction is a media merger (in which case additional time is allowed in light of the special procedures involved). The court is obliged to determine the appeal within two months in so far as is practicable.

Who may make an appeal?
An appeal under the Act may only be made by any of the undertakings which made the notification.
8. Selected Practical Issues

Is it possible to keep confidential a transaction which has been notified to the Authority?
No. The fact that the transaction is notified to the Authority must be published on the Authority’s website within seven days of the receipt of the notification. This notice invites third parties to make submissions within ten days of the publication of the notice on the Authority’s website. The notification itself is not published or made available to third parties. Only the names of the parties, the sector involved and the date by which third party submissions must be received are published on the Authority’s website.

The decision of the Authority in Phase I to clear a merger or to instituting a Phase II investigation must be published within two months. The determination following a Phase I investigation tends to be short. At the end of Phase II, the Authority must publish its determination in relation to the transaction within one month. When publishing its determination, the Authority will retract any genuinely confidential information identified by the notifying parties, (though, for example, market share ranges may replace the specific market share figures.)

Does the Act contain any special exemption for foreign-to-foreign mergers?
No. The Act applies to foreign-to-foreign transactions in full where the thresholds in the Act are met.

What happens if only one party notifies the transaction to the Authority or when parties make separate notifications?
Each party to a proposed transaction is under an obligation to notify the Authority of the proposed transaction. The Authority encourages parties to make joint notifications. Where separate notifications are made, the time limit within which the Authority must make a decision on the transaction starts on the date of receipt of the last notification.

May the Authority enforce compliance with its decisions?
Yes. The Authority may apply to the High Court for an injunction to enforce compliance with a commitment, determination or order. The Act provides for penalties of up to €10,000 and/or two years’ imprisonment where there is non-compliance with a commitment, determination or order.

May the parties complete the transaction prior to the Authority’s clearance?
No. If a transaction which must be notified is (a) put into effect without having been notified or (b) is put into effect prior to clearance, then the transaction is deemed to be void. This means the transaction is unenforceable as a matter of Irish law.

The Authority is concerned with, and may seek to punish, “gun-jumping” (i.e. premature closing of transactions). The Authority has held that a transaction is not permanently void and may be rendered valid once it has been approved by the Authority despite a late notification having been made. This means that the voidness of an unnotified merger is apparently only temporary and can be rectified by a later clearance from the Authority.

Once a clearance has been received from the Authority, how long do the parties have to put the transaction into effect?
The transaction must be put into effect within twelve months of a clearance determination from the Authority.